Supreme Court, U.S.
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CASE NO._____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

NORRIS SMITH,

Petitioner,

v.

JEFFERSON PARISH, CONSOLIDATED RECREATION AND COMMUNITY CENTER AND PLAYGROUND DISTRICT NUMBER 1 OF THE PARISH OF JEFFERSON; ET AL., TIM COULON Jefferson Parish President, in his Official and Individual Capacity; MICHAEL QUIGLEY, Director of the Jefferson Parish Park and Recreation Department and/or Consolidated Recreation and Community Center and Playground District Number 1, in His Official and Individual Capacity; KEVIN O' QUINN in His Official and Individual Capacity, and SCOTT MUHOBERAC Individually,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeal For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case revolves around civil service rules and regulation regarding promoting a classified civil servant and government discrimination. Under the Article 10 Section 7 of the Louisiana Constitution and the civil service rules, regulation and ordinance, promotion of a classified civil servant should be based upon merit, efficiency, fitness, and length of service, and the director of the civil service department shall reject any application of any person who is found to lack any of the qualification. Jefferson Parish Government promoted a less qualified White male over petitioner-- a member of a protected group. The District Court affirmed by the Fifth Circuit Court of Appeal failed to address the strict civil service rules and regulation regarding placement and promotions, and failed to address federal questions regarding governmental discrimination, retaliation and a hostile work environment of civil servants as it relates to equal protection of the law.

There are also a contradiction and conflict of the law regarding cross motions for summary judgments when discriminatory intent and motive are the nebulous and substantive law. The contradiction is if the lower court denies a party's motion for summary judgment, then there are genuine issues of material fact in dispute and the case must go to trial. On the contrary and in the same premise, if the lower court grants a party's motion for summary judgment then there are no issues of material fact. This court must address the issue of cross motions for summary judgment, for there cannot be a denial of one party's motion for summary judgment and a granting of the other party's motion for summary judgment. The issues for review are:

1. Does the Jefferson Parish Government's deviation from Louisiana Constitution and strict civil service regulation regarding promotion violate the Equal Protection Clause of both the Fourteenth Amendment of the United States Constitution and Article 1 Section 3 the Louisiana Constitution, Title VII of the Civil Rights Act of 1964 as amended 1991 (42 U. S. C. Section 2000e) and in turn violated 42 U. S. C. Section 1983?

2. Whether Jefferson Parish Government and its employees violated petitioner's equal protection of the law when they conspired to impeded petitioner's career advancement (promotion) because of race, and then retaliated against him for reporting the discrimination.

3. Whether the government's withholding evidence from petitioner regarding another candidate's qualifications was admissible to prove intent and motive as pursuant to Rule 404(b) of the Federal Rules of Evidence. Whether deviation from the strict civil service rules regarding promotion, affidavit, statements from former employees and deposition of a former employee stating Jefferson Parish Government and its employees testifying that Jefferson Parish conspired to discriminate and retaliate against petitioner was admissible for other purposes such as proof of motive and intent as pursuant to Rule 404(b) of the Federal Rules of Evidence

4. Whether Rule 56 of the Federal Rules of Civil Procedure is violated when the lower court denies one parties motion for summary judgment indicating disputed issues of material facts, and then grants another parties motion for summary judgment indicating no disputed issues of material facts.

5. Does summary judgment circumvents and violates the right to trial by jury as pursuit to the 7th Amendment of the United State Constitution and 42 U. S.C. 1981.

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Names of all parties appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Norris Smith petitions this Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit affirming the summary judgment entered in the United States District Court for the Eastern District of Louisiana.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

As far as Plaintiff is aware, the district court and court of appeals decisions are unreported. Both decisions are reproduced in the appendix.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

The date of Decisions of U. S. Court of Appeals for the Fifth Circuit sought to be reviewed: May 23, 2005. The statutory provision believed to confer on this Court jurisdiction to review by writ of certiorari is 28 U.S.C. section 1254(1) et seq.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Fourteenth Amendment of the U. S. Constitution

No State shall . . . deny to any person within jurisdiction the equal protection of the law

Article I, Section 3 of the Louisiana Constitution:

No person shall be denied the equal protection of the law. . .

42 U.S.C. Section 1983
Section 704 of Title VII, 42 U.S.C. section 2000(e)
Rule 56 of the Federal Rules of Civil Procedure
Article 10 Section 7 of the Louisiana Constitution,
Rule VI, 3.5 (A-1), Ordinance Number 11744
(8/1/74)

CONCISE STATEMENT OF THE CASE

This action is brought in part under the Equal Protection Clause of both the Federal Constitution and State Constitution, 42 U. S. C. Section 1983 and 42 U. S. C. Section 2000e, and for clarification relating to cross motion for summary judgment regarding governmental discrimination and retaliation against a classified civil servant. Petitioner, Norris Smith a classified civil servant with Jefferson Parish government applied for and was denied a promotion for a supervisor position. Jefferson Parish and its employees discriminated against Smith by failing to promote, and then retaliated against him for reporting the illegal employment practice of discrimination. After Smith was denied the promotion, Smith filed a formal complaint/appeal with Jefferson Parish Government. Jefferson Parish denied a hearing because plaintiff did not specifically plea discrimination. Smith met with Jefferson Parish President--Tim Coulon. Tim Coulon showed deliberate indifference to petitioner's complaint.

Thereafter, defendant through a series of harassment retaliated against petitioner culminating with his discharge.

FACTS MATERIAL TO QUESTIONS PRESENTED

In 1999, a Grounds Maintenance Supervisor position (Grounds Maintenance Supervisor code and class title Recreation Maintenance Supervisor Grounds 2355) position became vacant in the Jefferson Parish Recreation Department. Smith was already a Grounds Maintenance Foreman at the Jefferson Parish Recreation Department and was doing the work of the Grounds Maintenance Supervisor.

The Examination announcement provides that the minimum acceptance qualification requirements for admission to the examination are current Jefferson parish civil service employment and permanent status, plus at least three (3) years of general grounds maintenance experience indicating the ability to perform the tasks above through planning, estimating material equipment needs, and supervising employment. Smith applied for the Recreation Grounds Maintenance Supervisor position. Smith was qualified, had all the requirements, and was placed on the list of eligible candidates.

Jefferson Parish Government placed/promoted Scott Muhoborac (a White male in the building department) to the Recreation Maintenance Supervisor position. According to Scott Muhoberac's employment file, Scott Muhoberac's failed to meet the requirements and lacked the qualifications for the position. Mr. Muboberac was a groundskeeper from August 1990 to January 15, 1992-- less than two years experience. Mr. Muboberac was a trade helper, a repairman

painter and a repairman in maintenance in the Buildings section.

According to Article 10, Section 7 of the Louisiana Constitution[1] promotion for a civil service position should be based on **merit**, efficiency, and length of service. According to Jefferson Parish Civil Service Personnel Board Rule VI, 3.5 (A-1)[2], Ordinance Number 11744 (8/1/74), states that: Director of personnel shall reject any application

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1. According to Article 10 Section 7 of the Louisiana Constitution, Permanent . . . promotions in the classified . . . service under a general system based upon merit, efficiency, fitness, and length of service, as ascertained by examination which . . . shall be competitive.

2. Rule VI, 3.5 (A-1), Ordinance Number 11744 (8/1/74), provides

3.5 Director of personnel shall reject any application filed after the time fixed for closing receipt of applications, or after a specified number of applications, announcement the public notice of the test, has been received.

A. Subject to the Rules, the Director shall reject the application of any person for admission to any test of fitness, or refuse to test any applicant, or cancel the eligibility of any eligible on any employment list, who:

1. is found to lack any of the qualifications prescribed as requirements for admission to the tests for the class for which he has applied;

5. Has practiced or attempted to practice deception or fraud in any application, or any test or otherwise, in securing eligibility for appointment or attempting to do so.

of any person who is found to lack any of the qualifications. Jefferson Parish should have rejected Mr. Muboberac as an applicant because Mr. Muboherac was not qualified to take the test and be certified.

COURSE PROCEEDINGS IN THE COURTS BELOW

On July 3, 2001, petitioner filed a discrimination and retaliation complaint in the U. S. District Court of the Eastern District of Louisiana seeking relief as authorized by the 14TH Amendment of the United State Constitution and Louisiana Equal Protection Clause Article 1 Section 3, 42 U. S. C. Section 2000e et seq., 42 U. S. C. Section 1983, and the Louisiana Anti-discrimination statutes. Petitioner asserted that his equal protection and due process rights were violated as well. Petitioner request a trial by jury. Petitioner alleged that Jefferson Parish government and its employees decision not to award him supervisor's position constituted a violation of the Article 1 Section 3 of the Louisiana Constitution which states that No person shall be denied the equal protection of the law. . . , 14th Amendment of the United States Constitution and constituted a violation of 42 U. S. C. Section 2000e, and in turn violated 42 U. S. C. Section 1983. Petitioner also asserted that defendants retaliated against him as well.

B. Any of the conditions enumerated in (A) above which are found to be applicable to any employee in the classified service shall result in the immediate dismissal of such employee."

On September 8, 2003, Smith filed his renewed motion for summary judgment. On September 21, 2003, defendants filed a motion for summary judgment. On January 9, 2004, the Court denied petitioner's summary judgment which indicated that there were genuine issues of material fact and granted defendants' motion for summary judgment. The district court found that plaintiff successfully made a prima facie case of employment discrimination regarding his promotion denial. The district court found that Smith--a Black male, was a member of a protected group and that he suffered negative employment action when he was denied promotion and terminated from his position. However, the lower court held that Smith failed to produced any evidence of pretext. The lower court concluded that plaintiff's evidence of a deposition and two statements from former co-workers were inadmissible to prove pretext. The district court dismissed Smith's retaliation and due process claims as well. On January 20, 2004, Smith filed a motion for new trial/reconsideration based on new evidence. On February 6, 2004, petitioner filed an appeal. On May 28, 2004, the court denied petitioner's motion for new trial. On May 23, 2005, the Fifth Circuit Court of Appeal affirmed the district court's ruling.

SUMMARY OF THE ARGUMENT

1. The lower courts erred in failing to address Jefferson Parish Government's violation of petitioner's right to equal protection of the law. The 14th Amendment of the United States Constitutional and the Equal Protection Clause of the Louisiana Constitution provide that No person shall be denied the equal protection of the law. . . ,

and no state shall deprive any person of equal protection of the laws. The Equal Protection Clause was designed to prevent any person or class from received disadvantageous treatment by an arbitrary, hostile or discriminating classification. The equal protection clause guaranty means that no person or class of persons shall be arbitrarily denied the same legal protection afforded other persons or other classes in the same place and under the same circumstances.

Equal Protection of the Law is triggered when the government treats someone differently than another who is similarly situated and will apply to intentional or purposeful discrimination against an individual that is not rationally related to the defendant's goals. Petitioner states that Jefferson Parish Government denied him equal protection of the law by deviating from the Louisiana Constitution and its own civil service rules regarding promotion of civil service employees, discriminating and retaliating against him, and in turn violated 42 U. S. C. Section 1983 and Section 2000e.

2. There are contradictions and a conflict of the law regarding cross motions for summary judgments when discriminatory intent and motive are the nebulous and substantive law. If the lower court denies a party's motion for summary judgment, then there are genuine issues of material fact in dispute and the case must go to trial. In the same premise, if the lower court grants a party's motion for summary judgment then there are no issues of material fact. In this particular instance, the lower courts denied petitioner's motion for summary judgment which indicates that there were genuine issues of material facts to be tried, and granted defendants' motion for summary judgment

which indicates there were no issues of material facts. This court must address cross motions for summary judgment, for there cannot be a denial of one party's motion for summary judgment and a granting of the other party's motion for summary judgment.

3. The government's withholding of evidence from petitioner regarding another candidate's qualifications is admissible to prove discriminatory intent and motive as pursuant to Rule 404(b) of the Federal Rules of Evidence.

4. The Jefferson Parish Government's deviation from the Louisiana Constitution and its own strict civil service rules regarding promotion, affidavit, statements from former employees and deposition of a former employee stating appellees conspired to discriminate and retaliate against plaintiff was admissible for other purposes such as proof of pretextual motive and intent as pursuant to Rule 404(b) of the Federal Rules of Evidence

5. Summary Judgments circumvents and violates the right to trial by jury as pursuit to the 7th Amendment of the United States Constitution and the 42 U. S. C. Section 1981 (a) (c).

REASONS FOR GRANTING THE WRIT

I.

JEFFERSON PARISH GOVERNMENT'S DEVIATION FROM THE LOUISIANA CONSTITUTION AND CIVIL SERVICE REGULATIONS REGARDING PROMOTIONS VIOLATED THE EQUAL PROTECTION CLAUSE OF BOTH FEDERAL AND STATE CONSTITUTIONS.

A. The decision below conflicts with decisions of this Court on important issues that has created substantial uncertainty in the lower courts regarding equal protection of law as it relates to governmental discrimination and retaliation against a civil servant.

According to Louisiana Constitution Article 10 Section 7, Jefferson Parish Government is suppose to promote classified civil servants on the basis of merit, fitness, efficiencies, and length of service. According to the civil service regulation and ordinance, Jefferson Parish Government is supposed to make an eligible list of qualified candidates and shall reject the application of any person or cancel the eligibility of any person on any employment list, who is found to lack any of the qualifications prescribed as requirements for admission to the tests for the class for which he has applied. A supervisor position became vacant in petitioner's division. Petitioner was already the foreman of that division and doing the work as supervisor. Petitioner applied for the supervisor position. Jefferson Parish Government granted a White male the supervisors

position. Petitioner was more qualified for the supervisor position. Jefferson Parish Government deviated from the Louisiana Constitution and the civil service regulation and placed a less qualified person in the supervisor's position.

The district court found that although petitioner successfully made a prima facie case of discrimination regarding his promotion denial, proved that he was a Black male, and a member of a protected group, and that petitioner suffered negative employment action when he was denied the promotion and terminated from his position, petitioner failed to produce some evidence to prove pretext that defendants' reasons for not promoting was because of discrimination. Although in petitioner's complaint, petitioner asserts violation of equal protection, the lower courts never address Jefferson Parish government's violation of petitioner's equal protection of law.

The Fourteenth Amendment to the United States Constitution and Article 1 Section 3 of the Louisiana Constitution provides that (in pertinent part):

No State shall . . . deny to any one person within its jurisdiction the equal protection of the law.

No person shall be denied the equal protection of the law. . .

Equal Protection of the Law is triggered when the government treats someone differently than another who is similarly situated and will apply to intentional or purposeful discrimination against an individual that is not rationally related to the defendant's goals. Equal protection provisions

of the State and Federal Constitution mandates that people similarly situated receive like treatment. To prove a violation of the equal protection clause in the civil service context, the proponent of such argument must show the appointing authority (governmental employer) acted with discriminatory intent or purpose. Plaintiff claiming equal protection violation(s) bears the burden of proving that the defendant intentionally discriminated against him on the basis of race. *Coleman v. Houston Independent School District,* 113 F. 3d 528 (5th Cir 1997) *Moore v. Ware,* 800 So. 2d 99 (La. App 2nd 10/31/01). The Equal Protection Clause was designed to prevent any person or class from received disadvantageous treatment by an arbitrary, hostile or discriminating classification. *Pembina v. Consolidated Silver Mining & Milling Co.,* 125 U. S. 181 (1888), *Jones v. Helms,* 452 U.S. 412 (1981). The equal protection clause guaranty means that no person or class of persons shall be arbitrarily denied the same legal protection afforded other persons or other classes in the same place and under the same circumstances. *Roth v. Public Employees Retirement Board, 44 Ohio App. 2d 155 (1974)* (Secondary authority)

In this particular instance, petitioner asserted that defendants' violations the equal protection clause in his original complaint. The district court ruled that petitioner proved that he was a member of a protected group and that he successfully made a prima facie case of employment discrimination. See: appendix C page 9. However, the lower courts erred in failing to address whether Jefferson Parish Government and its employees deviation from Article 10 Section 7 of the Louisiana Constitution [1] and Jefferson Parish Government's own civil service rules and regulations[2]

when filing a vacancy.

Jefferson Parish government promoted a White person by the name of Scott Muhoberac to the vacant ground maintenance supervisors position. Petitioner submitted additional evidence into the record of Scott Muhoberac's lack of qualifications which indicated that Mr. Muhoberac failed to meet the requirement as per the announcement and therefore, failed to be eligible for the position. However, Jefferson Parish Government deviated from its own strict civil rules and promoted a less qualified candidate for the vacant supervisors position.

Jefferson Parish Government arbitrarily and capricious failed to apply its laws and ordinances regarding promotion of a civil servant, and thus, was a prima facie violation of petitioner's rights of the equal protection clause of the State and Federal Constitutions. Moreover, what is clear-- is that Jefferson Parish violated its own rules and regulations regarding certifying candidates for promotions by promoting a less qualified White candidate and a blatant violation of petitioner's rights under the Equal Protection Clause. Furthermore, in *Hazen Paper Co. v. Biggins,* 507 U. S. 604, 113 S. Ct. 1701 123 L. Ed.2d 338 (1993) and . *International Brotherhood of Teamsters v. U. S.* 431 U. S. 324, 97 S. Ct 1843, 52 L. Ed. 2d. 396 (1977), the U. S. Supreme Court recognized disparate treatment and disparate impact theories for claims of violation of equal protection. Jefferson Parish government not only violated petitioner's rights to equal protection but violated other civil servants' equal protection as well (See: Sandis Bell deposition and the transcript to Hobson's civil service dismissal hearing.) Smith's dismissed civil service complaint/appeal was used as

precedence to dismiss Mr. Hobson's civil service appeal. Dismissing Smith and Hobson's civil service appeals gives rise to an inference discriminatory intent and disparate treatment and disparate impact against its Black employees.

Jefferson Parish Government random selection and discriminatory application of the civil service rules, its violation of other civil servants' rights to equal protection proved violation of Smith's civil rights under the Equal Protection clause of the State and Federal Constitution. Jefferson Parish governments naked attempts to subvert the civil service system of promotion by merit and seniority, violated petitioner's equal protection of the law, and in turn, violated 42 U. S. C. Section 1983. Certiorari should be granted to resolve the lower courts' decision not to address a government's violation of a civil servant's equal protection of the law regarding promotion.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATIVE TO PROVING PRETEXT IN CIVIL SERVICE DISCRIMINATION CASE.

There exist among the circuits of the federal judicial system a conflict as to what constitutes proving pretext. Since the lower courts ruled that petitioner made a prima facie case of discrimination, petitioner's case reached the pretext stage. At this junction, the only question on summary judgment is whether the evidence, in its totality, supports an **inference** of discrimination, retaliation and pretext." *Evans*

v. City of Houston, 246 F. 3d 344 (5th Cir 2001)

The district court affirmed by the Fifth Circuit erred in their ruling granting respondents' summary judgment because the lower courts were influenced by its mistaken view of the law and facts regarding pretext of private employment promotion instead of laws regarding civil service rules relative to promoted public employees. Petitioner submitted additional evidence of pretext but was informed it was to late.

Pretext is addressed in *McDonnell Douglas v. Green,* 411 U. S. 792, 804-05, 93 S. Ct. 1817, 35 L. Ed 2d. 668 (1973). This Court held that relevant to the issue of pretext is evidence that "the plaintiff was treated differently than others similarly situated." This Court held that pretext may be demonstrated by the introduction of additional evidence at the conclusion of defendant's case or by strengthening the **inference** of discrimination . . . The plaintiff must be given a full and fair opportunity to demonstrate that reasons for his rejection was, in fact, a coverup for racially discriminatory decision. See: *McDonald v. Santa Fe Trail Transportation Co.,*427 U. S. 273, 282-83 96 S. Ct. 2574, 49 L. Ed 2d 493 (1976). According to *Texas Dep't of Community Affairs v. Burdine,* 450 U. S. 248, 254-56, 101 S. Ct 1089, 67 L. Ed 2d 207 (1981), this honorable court held that the 'plaintiff may succeed in this (proving pretext) . . indirectly by showing that **the employer's proffered explanation in unworthy of credence'". The plaintiff's burden of proving pretext may be shown through evidence, or evidence that demonstrates **inconsistencies or implausibilities in the employer's proffered reasons for its employment action.** *Chipollini v.*

Spencer Gifts, 814 F. 2d 893, 897 (3rd Cir. 1987).

Furthermore, in *Reeves v. Sanderson Plumbing Product, Inc.,* 530 U. S. 133 120 S. Cr. 2097 147 L. Ed 2d 105 (2000), *Akos Swierkiewicz v. Somema N. A.,* 534 U. S. 506, 122 S. Ct 992, 152 L. Ed 2d 1 (2002)., *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U. S. 308, 116 S Ct. 1307, 134 L. Ed 2d 433 (1996), this Court held that a prima facie case of discrimination together with sufficient evidence to believe employer's justification was false was potentially sufficient to support a finding of discrimination. In *Akos Swierkiewicz case*, this Court held that specific facts are not required to establish a prima facie case of discrimination. In *Reeves,* this Court held that (1) the plaintiff need not always introduce additional and independent evidence of discrimination, and (2) that employer was not entitled to summary judgment where the employee had (a) established a prima facie case of discrimination, (b) created **a jury issue concerning the falsity** of the company's claim as to why the employee was fired and (c) introduced additional evidence that the motivation was for age related animus. In the *O'Connor case*, with respect to pretext, this Court held and recognized that a prima facie case required " evidence adequate to create an **inference** that an employment decision was based on an illegal discriminatory criterion." Citing *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 326 97 S. Ct 1843, 52 L. Ed 2d 396 (1977). This Court held that disparate treatment occurs where the employer simply treats some people less favorable than other. According to *Rhodes v. Guiberson Oil Tools,* 75 F 3d 989 (5th Cir. 1996), *Boeing Co v. Shipman*, 411 F. 2d 365 (5th Cir. 1969), the Fifth Circuit Court of Appeals held that

the ultimate issue in Title VII cases is **whether the defendant intentionally discriminated against the plaintiff.** With respect to pretext, the Fifth Circuit held that there must be a conflict in substantial evidence to create a **jury question.** In discrimination case, direct evidence is rare, thus a plaintiff must ordinarily use circumstantial evidence to satisfy her burden of persuasion. See *Davis v. Chevron U.S.A.Inc.*, 14 F.3d 1082,1085 (5th Cir. 1994). Deberah C Malamud, *the Last Minuet: Disparate Treatment After Hicks,* 93 Mich. L. Rev. 2229, 2305 (1995).

Petitioner presented evidence of his qualifications for the promotion, additional evidence of respondent--Scott Muhobarac's employment history and lack of qualifications, and the strict civil service rules regarding promotion eligibility, three statements from former employees, transcripts from Sandis Bell's deposition (a former employee) and from Percy Hobson's civil service hearing (another former employee). This evidence overwhelmingly demonstrates that there were genuine issues of material facts of inferences of intent and pretext, such that, a reasonable jury could return a verdict in favor of the petitioner. This evidence gave **inferences** of discriminatory and retaliatory intent, disparate impact and treatment and pretext on the part of Jefferson parish government. Thus, summary judgment should have been precluded.

Nonetheless, petitioner presented evidence of pretext (facts unworthy of belief) upon which a jury could infer discriminatory motive, such that, the case should have gone to trial.

A. Cases of point regarding pretextual promotions in conjunction with the Civil Service Rules.

This Court and the other U. S. Circuit Courts of Appeal's rulings differ from the 5th Circuit U. S. Court of Appeals views regarding pretext relative to civil service rules on promotion and summary judgment. The cases on point regarding pretextual promotion in conjunction with civil service public employees are few. Nevertheless, in *United States Postal Service Board of Governors v. Aikens,* 460 U. S. 711, 103 S. Ct 1478, 75 L. Ed 2d 403 (1983), the Supreme Court held that by establishing a prima facie case of discrimination, the plaintiff created a rebuttable presumption that the employer unlawfully discriminated against him. The factual inquiry in a Title VII case is simply "whether the defendant intentionally discriminated against the plaintiff." In other words, is the employer . . . treating some people less favorably than others because of the race, sex, color, etc. In *Aikens,* just as in petitioner's case, both *Aikens* and petitioner were classified civil servants who were qualified for a promotion to a higher position and a non-minority was selected for the position. This Court remanded the case to the lower courts to decided the ultimate question whether the defendant intentionally discriminated against plaintiff.

The Third Circuit U. S. Court of Appeals' opinion regarding civil servant and pretextual promotion was that summary judgment are precluded if there are discrepancies in the evaluation process of promotion. See: *Hampton v. Borough of Tinton Falls Police Department et al.,*

98 F. 3d 107 (3rd Cir. 1996). In *Hampton,* the Third Circuit ruled that discrepancies in the evaluation process could support a jury finding that race was a motivating factor in the decision not to promote. The *Hampton case,* as in petitioner's case, both *Hampton* and petitioner were civil servants denied promotions and that the appointing authority(government employer) used subjective criterion to make its selection. The Third Circuit U. S. Court of Appeals held that the significance of such evidence is for a **jury's determination, not a court's.** The Third Circuit U. S. Court of Appeal concluded that discrepancies in the evaluation process were reasonable inference of pretext that a jury could return a verdict in favor of plaintiffs, and thus, summary judgment was precluded.

The Eight Circuit views were different from the Fifth Circuit regarding civil service pretextual promotions. The case on point is *Gilbert v. City of Little Rock Arkansas,* 722 F 2d 1390 (8th Cir. 1983). In *Gilbert*, there were also discrepancies in the promotional process of eligibility and certification within the civil service rules. Black police officers sued the City of Little Rock and others claiming race discrimination by the Police Department. The Lower Court entered summary judgment for the City. The Eight Circuit U. S. Court of Appeals reversed and remanded in part the issue regarding pretextual promotion. The Eight Circuit Court of Appeals held that the police department system of promotion systemically operated to exclude Blacks from a high level position. In *Gilbert*, just as in petitioner's case, to be eligible to compete for a promotion the candidate must be a permanent civil servant in a certain classification and

certified–placed on a list. The critical factor in being promoted however, was not to be placed on the list, but to be placed at a high standing on the list. The Eight Circuit Court of Appeals held that such actions would clearly be in violation of Title VII. In *Gilbert*, as in the petitioner's case, the lower courts erred by not drawing different inferences regarding the discrepancies in the promotion evaluation process.

The Ten Circuit U. S. Court of Appeals rulings were different from the Fifth Circuit regarding civil service rules relating to pretextual promotions. The case on point is *Randle v. City of Aurora,* 69 F 3d 441 (10th Cir. 1995). *Randle*, a civil servant, sued the employer for race discrimination under Section 1983 and Title VII. *Randle* -- a Filipino woman, applied for a promotion to a higher position. The City of Aurora certified *Randle* as qualified for the position and interviewed her, but passed over *Randle* in favor of a White woman. The District Court granted the City's summary judgment. The 10th Circuit United States Court of Appeals reversed the lower court's decision regarding the promotion stating that there were genuine issues of pretext precluded summary judgment on failure to promote discrimination claims. The *Randle case* is on point with petitioner's case, in that, there were discrepancies of the evaluation process regarding promotions. These discrepancies gave rise to inference of pretext upon which a jury could infer discriminatory intent, thus, summary judgment should have which precluded. In *Randle,* the 10th Circuit held that discriminatory animus may be inferred from a simple showing of pretext. **Thus, just a showing pretext is evidence which allows a jury to infer discriminatory**

intent. See: *Ingle v. Thiohol Corp.*, 42 F. 3d 622 (10th Cir. 1994). The Tenth Circuit concluded that it is not the purpose of a motion for summary judgment to force the judge to conduct a mini-trial to determine the defendant's true state of mind. So long as the plaintiff has presented evidence of pretext (facts unworthy of belief) upon which a jury could infer discriminatory motive, the case should go to trial.

Finally, the DC Circuit ruling on civil service pretextual promotions is different from the Fifth Circuit. The case on point is *Murray v. Rumsfeld*, 35 FEP 1167 (DC 1981). In the *Murray case,* just as in appellant's case, there were discrepancies in the promotion evaluation process. There were procedures in place geared toward promotion that was in the defendant's view a neutral, monolithic Army career management system. The Court held that the elaborate promotional system in place was apparently **a sham**. Just as in the *Murray case*, the appellees deviated from civil service rules and preselected a favorite candidate. These discrepancies gave rise to inference of pretext upon which a jury could infer discriminatory intent, thus, summary judgment should have been precluded.

In petitioner's case, the Fifth Circuit tooks the position with respect to pretextual promotion and a non-discriminatory reason, that although Article 10, Section 7 of the Louisiana Constitution stated that promotion regarding civil servant shall be made based upon merit, efficiency fitness, and length of service; that Jefferson Parish government's own civil service rule VI, 3.5 (A-1), Ordinance Number 11744 (8/1/74), which provides that the director of

personnel shall reject any application of any person who is found to lack the qualifications prescribe as requirements for the position; and that a less qualified White male (non member of the protected group) was promoted, petitioner failed to prove pretext for unlawful discrimination. The lower court as affirmed by the Fifth Circuit erred in its understanding of the Louisiana Constitution, civil service rules and laws regarding promotion, in that, the civil service rules and laws regarding promotion is more strict than private employment promotion. Deviation of the Louisiana Constitution and from civil service rules and ordinance gives rise to discriminatory, retaliatory and pretextual intent. Going against the law gives inferences of different motive-- in petitioner's case discriminatory and pretextual motive and intent. There were genuine issues of fact of pretext whether Muhoberac was eligible for the promotion, thus, precluding summary judgment.

Moreover, according to *Civil Service Com'n of New Orleans v. City of New Orleans,* 854 So. 2d 322, 2002-1812 (La. 9/9/03), the Louisiana Constitutional provisions involving civil service's rules are designed to secure adequate protection to public career employees from discrimination (political and otherwise), there intent is to preclude favoritism and their purpose is to guarantee security and welfare of public service. Id The prime objectives and purpose of the constitutionally created civil service system are to ensure that classified employees are: 1) competitively selected on the basis of merit, free from political influence, and 2) protected from discriminatory dismissal. Promotion constituted discrimination, where it was not in accordance with civil service system and was based on non-

merit factor of favoritism *Maurice v. Dept. of Police,* App. 4th Cir. 1995 94-2368 (La App 4th Cir. 6/7/95 657 So. 2d 501. Summery judgment should have been denied and a jury trial should have been allowed. Certiorari should be granted to resolve the conflict among the circuit relative to pretextual promotion regarding civil servants.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AND CONTRADICTION OF LAW AMONG THE CIRCUITS RELATIVE TO CROSS MOTIONS FOR SUMMARY JUDGMENT REGARDING PRETEXT AND ITS CIRCUMVENTION TO A TRIAL BY JURY.

A. The decision below conflicts with decisions of this Court on important issues that has created substantial uncertainty in the lower courts. The lower court's decision affects federal procedure, and the constitutional right to a trial by jury which is being circumvented by summary judgment proceedings

There is a contradiction and conflict of the law regarding cross motions for summary judgments when discriminatory intent and motive are the nebulous and substantive law. Petitioner was the first party of the law suit to file a default judgment and a motion for summary judgment. The district court affirmed by the Fifth Circuit denied petitioner's renewed motion for summary judgment and granted defendants' motion for summary judgment. The contradiction of law is: in cross motion for summary

judgment --if the lower court denies a party's motion for summary judgment, then there are genuine issues of material fact in dispute and the case must go to trial. In the same premise, if the lower court grant the other party's motion for summary judgment then there are no issues of material fact. This court must address cross motions for summary judgment , for there cannot be a denial of one party's motion for summary judgment and a granting of the other party's motion for summary judgment.

Summary Judgment is appropriate if "the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rules of Civil Procedure ("Rule") 56(c)[3]. The record must negate any evidence that may call for a contrary result or evidence that might be developed at trial. *Celotex Corp.*

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5. Federal Rules of Civil Procedure 56 provides that:

(c) "Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and **admissions on file**, together with the **affidavits**, if any, show that there is **no** genuine issue as to **any** material fact and that the moving party is entitled to judgment as a matter of law."

(e)"When a motion for summary judgment is made and supported as provided in this section rule, an adverse party may not rest upon the mere allegation or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, **if appropriate**, shall be entered against him."

v.Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d ,265 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). This Court required that if the non-movant shows the existence of genuine issues for **trial**, the motion for summary judgment must be denied. In *Anderson*, this Court clarified the term "genuine issue of material fact" as follows: As to materiality, the **substantive law** will identify which facts are material. This Court held that a summary judgment will not lie if the evidence is such that a reasonable **jury** could return a verdict for the non-moving party." Id. at 249. At the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Cole v. Chevron Chemical Co.*, 427 F. 2d 390 (5th Cir. 1970). Where different ultimate **inference** may be drawn from the evidence presented by the parties, the case is not one for summary judgment *United States v. Diebold*, 369 U. S. 654, 655 82 S. Ct 993, 994, 8 L. Ed 2d 176 (1962). Summary Judgments are inappropriate when discriminatory and retaliatory intent are the substantive law issues. Summary judgment are discouraged in employment discrimination cases because "nebulous questions of motivation and intent" are at issue. *Anderson, supra --See: Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct 486, 7 L.Ed. 458, 464 (1962). *Taylor v. United Regional Health Care Systems, Inc.* 2001 WL 1012803, at 3 (N.D. Tx. August 14, 2001) *Jones v. W. Geophysical Co. of Am.*, 669 F. 2d 280, 283 (5th Cir. 1982); United States v. Matagorda County Tx. 191 F. Supp 2d 673 (S D Tx 2002); *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 142 (1970).

Petitioner's affidavits and qualifications for the promotion, respondent--Scott Muhobarac's employment history and lack of qualifications, and the strict civil service rules regarding promotion eligibility the statements from former employees and transcripts from Sandis Bell's deposition and Percy Hobson's civil service hearing overwhelmingly demonstrates that there were genuine issues of material facts of inferences of discriminatory intent and pretext, disparate impact and treatment on the part of Jefferson Parish government such that, a reasonable jury could return a verdict in favor of the petitioner

The Fifth Circuit has chosen to apply a stricter standard regarding proving pretext in civil service context. The other circuit, as argued above, has ruled that discrepancies of the evaluation process of promotion give rise to proving pretext. Thus, summary should have been precluded. These differences in the other Circuit and the Fifth Circuit's contradictions of this Court's ruling makes it important for certiorari to granted to settle the conflict that has persisted among the circuits on these issues.

VI.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER THE GOVERNMENT'S WITHHOLDING OF ANOTHER CANDIDATES QUALIFICATION, THE DEVIATIONS FROM THE CIVIL SERVICE REGULATION, TRANSCRIPTS FROM FORMER EMPLOYEES WAS ADMISSIBLE FOR OTHER PURPOSES SUCH AS PROOF OF MOTIVE AND INTENT AS PURSUANT TO RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE.

According to the record, petitioner presented respondents--Scott Muhoburac's lack of qualification for the supervisor position, three statements from former employees one of the employees (Sandis Bell) was deposed, the transcript of Percy Hobson's civil service dismissal ruling as evidence of pretext, disparate treatment and impact and discriminatory intent. The Fifth Circuit ruled that these submissions were not competent summary judgment evidence because there were not notarized under oath.

Rule 404(b) of the Federal Rules of Evidence provides in relevant parts:

> Evidence of . . . wrongs, or acts . . . may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The lower court erred in holding that written statements made by other employees regarding racial animus were inadmissible because the statements were not notarized. In *Kelley v. Boeing Petroleum Services, Inc.*, 61 F. 3d 350, 360 (1995) the Fifth Circuit found that in discrimination cases, testimony about the employer's history and work practices may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive. Other acts evidence may be relevant and admissible in a discrimination case to prove, for example, intent or pretext. The discriminatory intent or retaliatory intent element can be proven by direct or circumstantial evidence. . . Thus, the jury properly could have considered

evidence of discriminatory acts. . . directed at employees other than the plaintiff, as tending to show the existence of racial animus in the present case. See; *Estes v. Dick Smith Ford, Inc,* 856 F. 2d 1097, 1103 (8th Cir. 1988) In *Bailey v. Formosa Plastics Corp*, 1997 U. S. Dist. Lexis 10713, 94-1447, Judge Lemelle denied the exclusion of evidence of acts of discrimination by the employer against other employees. The Fifth Circuit Court of Appeals erred by not addressing Rule 404 of the Federal Rules of Evidence regarding intent, motive and pretext. The Fifth Circuit's ruling on evidence makes it important for certiorari to granted to settle the conflict that has persisted among the circuits on these issues.

V.

CERTIORARI SHOULD BE GRANTED TO CLARIFY AND RESOLVE THE ISSUE WHETHER SUMMARY JUDGMENT CIRCUMVENTS THE RIGHT TO TRIAL BY JURY.

A. The decision below conflicts with prior decision regarding the right to trial by jury in discrimination cases. Summary judgment circumvents the right to trial by jury.

This Court has implicitly held that the right to trial by jury shall by preserved. Applicant states that his constitutional right to trial by jury has been violated through summary judgment proceedings. The Seventh Amendment of the United States Constitution provides that:

> "In Suit of common law. . . the right of trial by jury shall be preserved inviolate."

According to *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed 2d. 260 (1974), this Court held that the Seventh Amendment of the Constitution entitles either party to demand a jury trial in an action for damages. According to *Beacon Theatres v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.ed 2d 988 (1959), this Court held that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care and ruled that plaintiff had a right to trial by jury. [See: *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). In *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 258, 69 S.Ct. 1067, 1069, 93 L.Ed 1347 (1949), this Court held that **trial by jury is a vital and cherished right integral in our judicial system.** [See: *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 811-12, 81 L.Ed 1177 (1937); *Borgh v. Gentry*, 953 F.2d 1309, 1311 (11th Cir. 1992). A court's discretion to deny a jury trial is very narrowly limited and must, be exercised to preserve a jury trial. *Lorillard v. Pons*, 434 U.S. 575, 98 S.Ct. 866, 55 L.Ed. 2d 40 (1978).] In terms of discrimination and retaliation, according to *Perkins v. Spivey v. General Motors Corporation*, 911 F.2d 22 (8th Cir. 1990), the Eight Circuit Court of Appeals, remanded the entry of summary judgment on allegations of negligent retention of an employee, and ruled appellant must be given a jury trial. In *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 110 S. Ct. 1331, 108 L.Ed 2d 504 (1990), this Court held that when legal and equitable claims are joined in the same action, "the right to a jury trial on the legal claim, including all issues common to both claims, remains intact. Moreover, the U.S. Supreme Court in *Bailey v. Central Vermont Railway* 319 U.S. 350, 87 L.Ed. 1445 (1940), ruled that the right to trial by jury is a basic and fundamental factor of Federal

jurisprudence and that where fair-minded men might reach different conclusions as to breach of duty, the question is for the jury. See: *Roscello v. Southwest Airlines Company*, 726 F.2d 217 (5th Cir. 1984), *Ross v. Berhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), *Cox v. C.H. Masland and Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979). *Western Elec. Co. V. Milgo Elec. Corp.*, 573 F.2d 255, 257(5th Cir. 1978) cert denied. **(We must reverse judgments founded upon an unconstitutional denial of jury trial.)**

Petitioner asserts that a jury may draw different conclusions contrary to the district court rulings and therefore, a jury trial was necessary. Furthermore, section 102 of the Civil Rights Act of 1991 42 U.S.C. 1981(a)(c) provides that any party may demand a **Jury Trial** if a complaining party seeks compensatory or punitive damages under this section. According to *Landgraf v. USI Film Product*, 507 U.S. _____ (1994), and in *Wilson v. Belmont Homes, Inc.*, 970 F.2d (5th Cir. 1992) both the Supreme Court and the Fifth Circuit Court of Appeals held that Section 102 of the 1991 Civil Rights Act authorizes jury trial. The lower courts deprived petitioner's constitutional right to a jury trial as pursuant to both the 7th amendment of the U.S. Constitution and under the 1991 Civil Rights Act, and obviated his right to trial by summary judgments.

VI.

CONCLUSION

The lower courts decision conflicts with the decision of this Honorable Court and decisions of the Third Circuit Court of Appeals, the Eight Circuit Court of Appeals, and the Ten Circuit Court of Appeals regarding summary judgments in connection with pretext and discrimination as it

relates to civil service public employees. The lower courts found that petitioner proved a prima facie case of employment discrimination regarding his promotion denial by Jefferson Parish government. At that stage of the case, the only issue was proving pretextual intent. Petitioner present evidence which overwhelmingly demonstrates that there were genuine issues of material facts of pretext, such that, a reasonable jury could return a verdict in favor of the petitioner. Thus, summary judgment should have been precluded. The lower courts allowed summary judgment in discrimination cases to violate and circumvent the right to trial by jury. Petitioner cites *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 142 (1970), in which Justice Black stated that the right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision. Justice Black goes on to say **"the advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment."**

For all the forgoing reasons, petitioner prays that this Court grants the petition for writ of certiorari and prays that the lower courts' decisions be reversed and remanded.

Respectfully submitted,

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Attorney for Petitioner
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New Orleans, La. 70119
504 947-5297

APPENDIX

APPENDIX

A. Court of Appeal Decision, May 23, 2005

B. Final Judgement Decision, January 9, 2004

C. Order from the U.S. District Court for the Eastern District of Louisiana

D. Seventh Amendment of the U.S. Constitution

E. Rule 56 of the Federal Rules of Civil Procedure

F. Section 704 of Title VII, 42 U.S.C. Section 2000(a) of the Civil Right Acts

G. 42 U. S. C. Section 1981 Right to Trial.

APPENDIX A 1

Filed May 25, 2005
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30155

District Court Docket No. 01:CV-2042-B

NORRIS SMITH,
Plaintiff-Appellant,
versus

JEFFERSON PARISH, CONSOLIDATED RECREATION AND COMMUNITY CENTER AND PLAYGROUND DISTRICT NUMBER 1 ET AL
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
No. 01-CV-2042-B

Before DAVIS, SMITH, AND DENNIS, Circuit Judges.

PER CURIAM:
Norris Smith appeals a summary judgment in his suit against his former employer, Jefferson Parish Consolidated Recreation and Community Center (Center) and four of its employees for , inter alia, racial discrimination and retaliation. We review a summary judgment de novo and are bound by the same standard as is the district court. [1] Finding no error, we affirm.

Smith claims he was not selected for a promotion on account of his race. The district court determined that Smith had established a *prima facie* case because he is a member of a protected class and was certified as eligible and sought the supervisory position ultimately awarded to another employee not within the protected class. The court concluded that Smith had failed to demonstrate a genuine issue of material fact as to whether the Center's proffered legitimate, nondiscriminatory reason for not selecting him was pretext for unlawful discrimination.

Smith contends the court should not have required hm to demonstrate pretext because the Jefferson Parish failed to carry its antecedent burden of articulating a legitimate, nondiscriminatory rationale for denying him the promotion. Indeed, Smith attacks Jefferson Parish Center's proffered rationale–Smith's poor performance during the interview process relative to other potential candidates– as "unworthy of credence.: But the governing law explicitly precludes courts from testing the credibility of reasons proffered by employers in response to a *prima facie* case of alleged discrimination; the "burden on the employer is only of production, not persuasion, involving no credibility assessment." [2]

Pursuant to 5th Circuit R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

1. See *Bryan v. McKinsey & Co.*, 375 F.3d 358, 360 (5th Cir. 2004) (Federal . R. Civ. P. 56©).

2. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U. S. 248, 255-56 (1981).

Smith attempts to demonstrate a genuine issue of material fact as to pretext by reference to three self-styled affidavits submitted by former co-workers. Only one of these submissions, however, is at all probative of unlawful discrimination. In any event, as the district court concluded, this submission is not competent summary judgment evidence, because it is not sworn to be true and correct before a public notary or stated to be true and correct under penalty of perjury.[3] Moreover, Smith's unsupported allegations and his own subjective belief that he was not selected for the promotion based on race are insufficient to raise a fact issue as to pretext. [4] Summary judgment on this claim was appropriate.

II.

Smith contends he was terminated in retaliation for filing complaint with state and federal agencies. The district court decided that Smith's claim fails because he offered nothing but unsupported statements linking the protected activity to the termination decision and because the record indicates that Smith had received negative performance appraisals and disciplinary action before the decision was made to termination him. Smith claims that his performance was adequate and that these infractions were trumped up, but he has failed to provide any competent evidence that his supervisor's dissatisfaction with his performance and demeanor was not the reason for his termination. The district court was correct in entering summary judgment on the retaliation claim.

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3. See *Nissho -Iwai Am. Corp. V. Kline,* 845 F. 2d 1300, 1306 (5th Cir. 1988) 28 U. S. C. Section 1746.

4. See *Ramsey v. Henderson,* 286 F. 3d 264, 269 (5th 2002), *Lawrene v. Univ. of Tex Med. Branch at Galveston,* 163 F. 3d 309, 313 (5th Cir. 1999)

III.

The district court denied Smith's post-judgment motion for reconsideration, finding that the evidence Smith claimed to be newly-discovered was previously available to Smith and was in any event of little substantive value. Smith complains of the denial but has failed properly to appeal the order denying the motion. His notice of appeal, filed after the entry of judgment but before entry of the order denying his motion, was ineffective to appeal the entry of judgment until the order disposing of his reconsideration motion had been entered. [5] Because Smith did not amend his previously filed notice of appeal, in which he designated only the summary jdugment order as being appealed, appellate review of the order denying his motion for reconsideration is precluded. [6]

AFFIRMED. [7]

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5. See: *Simmons v. Reliance Stand. Life Ins. Co.* 310 F. 3d 865 , 868 n. 1 (5th Cir. 2002); FED R. APP. P . 4 (a) (4) (A)(iv), (B)(i)

6. See. FED. R. APP. P 4 (a)(4)(B)(ii), 3©)(1) (B).

ISSUED AS MANDATE; 1/09/2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NORRIS SMITH,	*	CIVIL ACTION
Plaintiff,	*	
VERSUS	*	NO. 01-2042
	*	
JEFFERSON PARISH	*	
RECREATION, ET. AL ,	*	SECTION "B"
	*	
Defendant.	*	

FINAL JUDGMENT

Pursant to the Court's Order and Reasons granting Defendants' Motion for Summary Judgment (Rec. Doc. No. 52), Judgment is hereby entered in favor of Defendants and against Plaintiff Norris Smith.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in **favor** of Defendants and against Plaintiff Norris Smith, dismissing with prejudice his claims against the Defendants, each party to bear its own costs.

New Orleans, Louisiana, this 7th day of January, 2004.

IVAN R. LEMELLE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NORRIS SMITH,	*	CIVIL ACTION
Plaintiff,	*	
VERSUS	*	NO. 01-2042
	*	
JEFFERSON PARISH	*	
RECREATION, ET. AL ,	*	SECTION "B"
	*	
Defendant.	*	

ORDER AND REASONS

Defendants Jefferson Parish –Consolidated Recreation and Community Center, Kevin O'Quinn Parish Government President Tim Coulon, Michael Quigley, et al. (together defendants) move for summary judgment on Plaintiff's claims of race discrimination through failure to promote and retaliation, as well as his Section 1983 action for violating due process. (Rec. Doc. No. 52) Defendants calim that plaintiff, Norris Smith, fails to meet his burden under the McDonnell standard, that his claims are premature, and that defendants are entitled to qualified immunity. Plaintiff also moves for summary judgment on his claims. (Rec. Doc. No. 53)

For reasons stated infra, **IT IS ORDERED** that defendant's motion summary judgment is GRANTED and Plaintiff's motion are DENIED with respect to the Title VII discrimination (failure to promote) claim; and retaliation claim; the due process claim, and claims asserted under state law.

Causes of Actions and Fact of Case

Plaintiff has been an employee with the Jefferson Parish Parks and Recreation Department ("Jefferson" Parish Government) for 17 years. (Defs.'s Mem., Ex. 35, Dep. Of Norris B. Smith (Smith's Dep.) p. 47) In 1999, a supervisory position with Jefferson became available in the Consolidated Recreation and Community Center. Jefferson superiors certified Smith as well as four other employees as candidates for the position.[1] (Id. Ex 3) After all certified candidates were interviewed, Jefferson chose Scott Muhoberac as the new Grounds Maintenance Supervisor. (Def. 's R. 56.1 Stmt para 7 Ex. 36) After his promotion, Muhoberac became Smith's immediate supervisor.

Smith believe that he was more qualified than Muhoberac and was thus wrongfully denied the promotion. (See Id. Ex 6) Smith filed, a Petition of Appeal to the Personnel Board (Civil Service Department) on August 20, 1999. (Id. Ex. 6; Pl. 's Mem. Ex IV[2]) In his petition, Smith made no specific allegations of discrimination, stating that the promotion denial "may or may not be (due to discrimination). (Id. at 2) . The Personnel Board denied Smith's appeal on October 19, 1999. (Pl. 's Mem. Ex V). Plaintiff asserts that he met with Tim Coulon, **Jefferson Parish President** in November, 1999 to present his claim of

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1. Under Personnell Rule VII of Jefferson Parish, an appointing authority must specify the "necessary and desirable qualifications" of a person needed to fill a vacancy and should also prepare a list of eligibles. (See: Defs.' Mem. Ex. 2, Rule VII, Ordinance 18081)

2.Exhibits cited as part of Plaintiff's Motion for summary judgment refer to exhibits attached to Plaintiff's first motion for summary judgment filed on December 31, 2002, (Rec. Doc. NO. 29)

discrimination. (Defs. ' R. 56.1 Stmt. Para 10). Defendants deny the occurrence of this meeting, but do not contest that it took place for the purposes of this motion. (Defs. Mem, Para 10, n. 10)

Beginning in December, 1999, Smith was disciplined and warned a number of times – for an unnamed infraction in December 1999 (later expunged); for substandard performance in May of 2000; and for disobeying a supervisor in July 31, 2000. (See. E.g., Defs.' Mem. Exs. 13, 15; Pl. Mem Ex. IX) Following the July 2000 incident, Smith was told in a letter from Muhoberac that he had engaged in a "very serious infraction", that "immediate improvement in [his] performance and attitude is needed and expected" and that any future problems would result in "severe disciplinary action" against him (See Defs.' Mem. Ex 15, August 16, 2000 letter). On September 28, 2000, Smith was suspended for three days following a Pre Disciplinary hearing for various alleged instances of insubordination. (Id. Ex. 16). Smith was told that his refusal to answer questions during the hearing contributed to his suspension. (Id.)

In response to these disciplinary actions, Smith filed several grievances. In July 2000, Smith filed an employee grievance with the Human Resources Management Department ("HR") contesting the warning he received on May 16, 2000. He also contested the warning he received on July 31, 2000. The HR upheld the actions taken by Smith's superiors on July 31, 2000, in their opinion issued on Juy 25, 2000. (Id. Ex. 13, Report of Finding and Recommendations).

On September 27, 2000, Smith filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging acts of race discrimination and retaliation between

October 21, 1999 and September 22, 2000. (Id. Ex. 17) Specifically he alleged that (1) he was denied the promotion to Grounds Maintenance Supervisor because of his race, and (2) he was harassed in retaliation for his grievances. (Id.).

Between January 7, 2001, and March 26, 2001, several additional predisciplinary hearing and a documentation performance appraisal were held concerning Smith's continued infractions of his work duties. In a hearing on February 28, 2001, Mike Quigley presented videotape evidence which allegedly depicted Smith neglecting his work duties and, at one point, standing idle for over an hour[3]. (See Id. Ex 24). Smith was subsequently accused of videotaping his superiors on March 1, 2001, while he was on requested sick leave. (Id. Ex. 19). A hearing was held to address this incident. (Id. Ex. 20) . According to defendants, Smith refused to defend his actions or answer any questions posed to him during this and subsequent hearing. (Id. at 4,5,8,9)

On March 27, 2001, Michael Quigley issued a termination letter to plaintiff in which the events which led to the decision to terminate him at detailed. (See. Id. Ex. 24). The reasons cited for Smith's termination include insubordination and negligent performance of his duties. (Id.)

In April 2001, Smith received a right to sue letter

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3. During the time period involved in Smith's allegations of race discrimination and retaliation, Michael Quigley was the Director of the Parks and Recreation for Jefferson Parish. As part of this position, Quigley was responsible for making appointments to open positions and take actions in order to maintain standards of effective service (See. Defs' Memo Ex 36, Aff. of Michael Quigley Para 3-4).

from the EEOC concerning his September 27, 2000, complaint. (Id. Ex. 26) On May 17, 2001, Smith filed a second EEOC Complaint against Jefferson alleging race discrimination and retaliation. (See. Id. Ex 27). Smith filed the instant lawsuit on July 3, 2001. He received a denial and a Right to Sue letter on August 29, 2001 for his second EEOC complaint.

On September 30, 2002, this Court addressed defendants' initial motion for summary judgment in this matter, and dismissed all but the following claims: the Title VII claim and the claim under La. R. S. 23: 332; and the Section 1983 claim against Kevin O 'Quinn, Michael Quigley, Tim Coulon and Scott Muhoberac in their individual capacities. (Rec. Doc. No. 23).

LAW AND ANALYSIS

Summary judgment is proper if the pleadings, depositions, interrogatories answers and admissions, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 c ; see; also *Celotex Corp. V. Catrett,* 477 U. S. 317, 327, 106 S. Ct. 2548, 2554-54(1986). A genuine issue exists if the evidence would allow a reasonable jury to return a verdic t for the nonmovant. *Anderson v. Liberty Lobby, Inc.,* 477 U. S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Although the Court must consider the evidence with all reasonable infernces in the light most favorable to the non-moving party, the nonmovant must produce specific facts to demonstrate that a genuine issue exists for trial. *Webb v. Cardiothoracic Surgery Associates of North Texas,* 139 F. 3d 532, 536 (5th Cir.

1998).. The nonmovant must go beyond the pleadings and use affidavits, depositions, interrogatory responses, admissions, or other evidence to establish a genuine issue. Id. Accordingly, conclusory rebuttals of the pleadings are insufficient to avoid summary judgment. *Travelers Ins. Co v. Liljeberg Enter., Inc.*, 7 F.3d 1203, 1207 (5th Cir. 1993).

For a Title VII plaintiff to survive a motion for summary judgment, he must show evidence sufficient for a factfinder to reasonably conclude that the negative job action was driven by discriminatory animus or to demostrate the existence of a genuine issue of fact a sto the truth of the employer's proffered reasons for the challenged action. Plaintiff's claims are evaluated using the burden shifting framework established in *McDonnell Douglas Corp. V. Green*, 411 U. S. 792, 93 S. Ct 1817 (1973).

First, a plaintiff must establish a prima facie case by proving the elements of a discrimination claim. *See: Russell v. McKinney Hospital Venture*, 235 F.3d 222(5th Cir. 2000). If the plaintiff proves a prima facie case, a presumption of discrimination arises. See *Bodenheimer v. PPG Industries, Inc.*, 5 F3d 955, 957 (5th Cir. 1993). The burden of production then additional evidence of pretext, summary judgment may properly be granted. See: e.g. *Enplanar Inc., v. Marsh*, 11 F.3d 1284, 1295 (5th Cir. 1994); *Armstrong v. City of Dallas*, 997 F.2d 52, 67 (5th Cir. 1993).

Employment discrimination claims under Louisiana State discrimination laws are analyzed under the same framework as Title VII claims. LSA R. S. 301 et seq. The Louisiana statute mirrors federal law, 42 U. S. C. A. Section 2000e, et seq., and because of its similarity, Louisiana courts routinely look to federal jurisprudence for guidance in application of the act. *Plummer v. Marriott Corporation,*

654 So. 2d 843 (La. App. 4th Cir. 1995)., See *Robinson v. Health Works Intern., L.L.C.*,837 So. 2d 714, 718 (La. App. 2d Cir. 2003).

DISCUSSION

A. Denial of Promotion

This Court finds that Smith successfully makes a prima facie case of employment discrimination regarding his promotion denial. First, as a Black male, he is a member of a protected group. Furthermore, Jefferson placed Smith in a group of those "certified" for the position, a strong indication that Smith was qualified for the supervisory position. (Defs.' Mem. Ex. 3). Smith also suffered negative employment action when he was denied the promotion and terminated from his position. (See *Southard v. Texas Bd. of Criminal Justice,* 114 F.3d 539, 555 ((5th Cir. 1997) ("Adverse employment actions include discharges, demotions, refusals to hire, refusals to promote, and reprimands.")
Finally, in satisfaction of the requirement that plaintiff show that he was replaced by a non-member of the protected class, Defendants admit that the job sought by Smith was ultimately goven to Scott Muhoberac, a White male. (See. e g. Defs. ' Mem. Ex. 36 para 11)

The burden thus shifts to Defendant to provide a non-discriminatory reason for not promoting the plaintiff. Defendants' state simply that Muhoberac became the leading candidate for the position after the interviews of all certified candidate were completed. In particularly, Defendants fault Smith for showing no interest in an additional vacancy at Lafreniere Park and because, in contrast to Muhoberac, Smith did not address the inefficiency of the Community Center or offer potential solutions. (See Affidavit of

Michael Quigley paras 9, 10)

Although this is not a particularly compelling argument, the burden defendants must meet at this stage is not a heavy one. The burden is one of the production, not persuasion and "can involve no credibility assessment." *St. Mary's*, 509 U. S. At 509.

It is at this stage that Smith's argument fails. As the plaintiff, he must produce some evidence that the defendants' proffered reasons are merely pretextual, such that the real derivation of the action arose from an impermissible animus. See *Texas Dept. Of Cmty. Affairs v. Burdine,* 450 U. S. 248, 255 n 10, 101 S. Ct. 1089, 1094-95 (1981) Smith has not produced any evidence that would cause the court to call Jefferson's motives behind their hiring decision into question; he has thus failed to meet his burden.

Plaintiff attempts to raise a factual dispute concerning defendant's motivation through allegations that defendants "treated . . . White employees better than Black employees in the areas of promotion . . . " And " defendants discriminated against [Smith] by failing to promote him." (Pl. s Mem. At 14-15) His only support for these allegations are his own observations, stated without detail in his deposition, (see Defs.' Opp. Mem. Ex B), and the statements of three former co-workers who attest to the management's dislike of Smith and the alleged vendettas against him. (See Exs. XI, XII, XIII) . Only Mr. Bordelon's statement includes any support for the allegations of racial animus. In his statement, Bordelon says theat Kevin O'Quinn, a maintenance coordinator, was overheard telling Muhoberac that he "wanted him to see to it that Mr. Norris Smith get(s) terminated because he did not like that Black S.B" (Pl.'s

Mem. Ex X)

Unfortunately, Smith has produced Bordelon's testimony in the form of an unsworn statement making it inappropriate as summary judgment evidence. (See *Nissho-Iwai Am. Corp., v. Kline,* 845 F.2d 1300, 1306 (5th Cir. 1988) ("An unsworn statement is incompetent to raise a fact issue precluding summary judgment.") And, even allowing the statement, Smith does not produce enough direct, circumstantial or statistical evidence to rebut defendants; reason for selecting Mr. Muhoberac or to support the allegations that there is causal link between his race and the failure to promote. See *Magana v. Tarrant/Dallas Printing Inc.,* 1998 WL 548686 *4 (N. D. Tx. Aug 21, 1998) (collecting case) . Title VII admittedly prohibits an employer from creating or condoning a discriminatory hostile or abusive work environment. Civil Rights Act of 1964, Section 701 et seq., as amended, 42 U. S. C. A Section 2000e et seq. But, Smith puts forth no time period for when the comment overheard by Bordelon occurred, and neither does he present evidence of Muhoberac's response. Mere presentation of the occurrence of an isolated statement, standing alone, is insufficient to show discriminatory animus and cannot defeat summary judgment unless the statement is both proximate and related to the employment decison in question. *Shackleford v. Deloitte & Touche, LLP,* 190 F.3d

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4 In Bodelon's statement, he refers to an individual by the name of "Ma Hovarac". For the purposes of this motion, it is assumed that he is referring to Muhoberac, the supervisor who was chosen for the position over Smith. (Pl.'s memo. Ex X).

398 (5th Cir. 1999). See also *Meritor Savings Bank, FSB v. Vinson,* 477 U. S. 57, 67, 106 S. Ct. 2399 (" ' Mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII", *Bahl v. Royal Indem., Co.,* 115 F. 3d 1283 (7th Cir. 1997) ; *Cone v. Longmont United Hosp. Ass'n,* 14 F.3d 526 (10th Cir. 1994).

No fact finder could reasonably conclude from the evidence presented that the decision not to promote Smith was driven y discrimination animus. Accordingly, plaintiff's failure to promote claims under Title VII and the Louisiana Anti-Discrimination standard are dismissed.

B. Retaliation

Plaintiff's second claim is that defendants harassed and "wrongfully and retaliatorily discharged" him because he complained to the Jefferson Parish Personnel Board/Civil Service Commission. (See Plt. 's Mem. At 16).

There are three elements to a prima facie case of retaliation under Title VII; (1) the plaintiff engaged in an activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse action. See: e. g. *Raggs v. Miss. Power and Light Co.,* 278 F. 3d 463, 471 (5th Cir. 2002); *Evans v. City of Houston,* 246 F. 3d 344, 352 (5th cir. 2001); *U. S. V. Matagorda County, Texas,* 181 F. Supp. 2d 673, 682 (S. D. Tx 2002).

The causal link required by the third prong of the prima facie cause doe not rise to the level of a "but for" standard. *Raggs,* 278 F. 3d at 471. The plaintiff "need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to

establish the 'causal link' element of a prima facie case." *Long v. Eastfield coll.*, 88 F. 3d 300, 305, n. 4 (5th Cir. 1996) (citation omitted) As with the failure to promote claim, if the plaintiff is able to establish failure to promote claims, the burden then shifts to the defendants to demonstrate a legitimate nondiscriminatory purpose for the employment action." *Aldrup v. Caldera*, 274 F.3d 282, 286 (5th Cir. 2001) . If the defendant satisfies this burden, the plaintiff must prove that the employer's stated reason for the adverse action was merely a pretext for the real, discriminatory purpose. Id. At the summary judgment stage, the nonmovant need only point to the existence of a genuine issue of material facts.

Smith's retaliation claim suffers from both procedural and substantive issues. Smith cannot claim his complaint to the personnel board as protected speech unless he was complaining about unlawful action or discriminatory practice. See: *Dupont- Lauren v. Schneider (USA) Inc.*, 994 F. Supp. 802, 823 (S. D. Tx. 1998). In his 1999 complaint to the personnel board, Smith specifically states that he is not making a claim of discrimination. Smith relies on his filing of two charges with the EEOC to support the necessary finding that he engaged in protected activity. (Pl.'s statement of facts, para 80) . The second charge followed immediately after his termination and could not reasonably have given rise to a retaliatory termination. The first charge was filed approximately six month before his termination, and although he had not yet received his right to sue letter, could be reasonably found to charge unlawful discrimination, constitute a protected activity and have given rise to retaliation.

Defendants point to the fact that smith filed his federal claim before he received a right to sue letter for the EEOC. True, "(t)itle VII . . . specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Ashley v. City of Jackson, Miss.*, 464 U. S. 900, 903, 104 S. Ct. 255. (1983) These prerequisites consist of (1) filing timely a charge of employment discrimination with the Commission, and (2) receiving the Commission's notice of the right to sue. Id. (Emphasis added). See also *Wynn v. Whitney Holding Corp.*, 220 F. Supp. 2d 582, 591 (M. D. La. 2002) Smith had not received his Right to Sue letter when he filed the instant suit and it is established that a district court lacks jurisdiction over a Title VII suit where Right Sue has not been issued. *East v. Romine, Inc.*, 518 F. 2d 332(5th Cir. 1975); *Beverly v. Lone Star Lead Constr. Co.* 437 F.2d 1136 (5th Cir. 1971); *Dent v. St. Louis–S. F. Ry. Co.*, 406 F. 2d 399(5th Cir. 1969). Defendants urge that this should preclude Smith's claims "as it pertains to the period from September 28, 2000, until March 27, 2001." (Def. ' Mem. at 9). However, a month after his initial termination letter, Smith did receive a Right to Sue Letter, although that letter does not appear to have been produced to this Court. Further, there is some precedent from other Circuits that the requirement of the Right to Sue Letter may be waived by the parties or the court. *Pietras v. Bd. of Fire Comm'rs*, 180 F. 3d 468, 474 (2d Cir. 1999) (collecting case). There is no good cause in the instant record to waive the Right to Sue letter requirement.

Even with a waiver, Smith again fails to offer anything but unsupported conclusory statements linking the protected activity to the adverse action. The unsworn

statement from Smith's co worker Bordelon is inadmissible and reflects a statement from someone who was not the ultimate authority in the decision to terminate Smith. Smith give no indication that his employers were in fact aware of his second EEOC filing and furthermore, he cannot rely on the temporal proximity of his EEOC filing and his termination to demonstrate a retaliatory motive at play. For temporal proximity between an employer's knowledge of protected activity and an adverse employment action to equal sufficient evidence of causality to establish a prima facie cases, that temporal proximity must be very close. *Clark County School Dist. V. Breedon,* 532 U. S. 268, 273, 121 S. Ct. 1508(citing *Richmond V. ONEOK, Inc.,* 120 F. 3d 205, 209 (1st Cir. 1997) (3-month period insufficient); *Hughes v. Derwinski,* 967 F. 2d 1168 (1174-1175) (7th Cir. 1992) (4 month period insufficient). At seven months, the teme between Smith's initial EEOC filing and his termination is simply too long to infer a causal relation.

Furthermore, defendants produce evidence that Smith was having difficulties long before the decision to terminate him. (See. e.g., Defs' Mem. Ex 11. Letter from Michael Quigley, dated June 26, 2000 ("they have noticed other occassions where, either you or your subordinate staff were not doing work."). Defendants cite there negative performance appraisals and disciplinary actions as their motivation for Smith's termination. (See, e.g., Defs' Opp. Ex. A, at 76-80, Dep. Of Norris Smith, taken on April 22, 2003, Defs. Mem. Ex 9,10, 11,14). Smith states that the charges against him were "trumped up" (Pl. mem. At 6), but give no evidence to support this allegation. In fact, Smith also state that he "received excellent to superior rating with respect to job evaluation" –a statement clearly disputed by

the evidence. (Plt's Mem. At 1). Thus, Smith has failed to rebut the reasons given by defendants, that they terminated Smith due to his poor job performance and insubordinatin. The relationship claim is thereby dismissed.

C. Due Process

Finally, Smith seeks damages under 42 U. S. C. Section 1983 for denial of due process in connection with the employment actions above. Smith states that he suffered a violation of Section 1983 when defendants failed to provide a hearing on each disciplinary action taken against him and when he was summoned "into the office on the same day of the alleged insubordination" without notice of the planning meeting, denying Smith the ability to have witnesses testify on his behalf. (Plt's Opp. Mem. At 18). Smith states that Jefferson failed to have a "civil service hearing" in violation of Personel Rules and Louisiana Civil Service and characterizes defendants' means of addressing his complaint as "perfunctory."

Defendants Muhoberac, Quigley, O'Quinn and Coulon have asserted qualified immunity to these claims. The test of qualified immunity with regards to the acts of government officials immunity with regards to the acts of government officials asks whether the plaintiff has alleged a violation of a clearly established right and if so, whether defendant's conduct was objectively unreasnable. *Hare v. City of Corinth, Ms.*, 22 F.3d 612, 614 (5th Cir 1994); *Anderson V. Creighton*, 483 U. S. 635, 639, 107 S. Ct. 3034, 3038, (1987). Objective reasonableness is assessed in light of legal rules clearly established at the thime of the incident. *Pfannstiel*, 918 F. 2d at 1183. Motions for summary judgment based on qualified immunity are, in the normal

course of events, to be resolved as a matter of law. See *Hunter v. Bryant,* 502 U. S. 224, 228 (1991) ("Immunity ordinarily should be decided by the court long before trial.") Defendants do not dispute that plaintiff had the right to due process prior to disciplinary actions and termination. However, they assert, and this Court agrees, the defendants action were not objectively unreasonable, as several predisciplinary hearings were held to address Smith's disciplinary actions.

In order to establish a due process violation occurred, Smith must first show that he has a legally recognized propery interest at stake. Such a showing, as the Fifth Circuit noted in *Schaper v. City of Huntsville,* must be made by reference to state law. 813 F2d 709, 713 (5th Cir. 1987). " The Constitution does not create property interests; 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" Id. Under Louisiana law, as a permanent civil service employee, Smith had a property interest in his job. *Wallace v. Shreve Memorial Library,* 97 F 3d. 746, 748 (5th Cir. 1996).

However, smith has failed to support his claim with evidence that he was denied notice or an opportunity to be heard regarding the actions mentioned in the complaint. Smith does not provide details of which disciplinary actions occurred without a hearing. Numerous "predisciplinary hearings" were conducted and according to evidence provided by defendants, Smith refused to actively participate in most if not all of these hearings. Therefore, Smith was given notice of the charges against him, the reason for those charges, and an opportunity to address the charges at the hearings. (See Defs' Mem. Exs. 9-13, 16, 19, 20, 23, 24; Ex

21, Smith Dep. At 200-201) . Although Smith alleges that these hearings did not occur, transcripts were made of at least on proceeding, and several of the warnings are signed by Mr. Smith and contain his comments. (See e.g., Id. Exs. 9,20) As with his other claims, Smith once again relies on conclusory rebuttals. Absent any production of specific facts to support his allegations of due process violations, Smith's Section 1983 claim cannot survive summary judgment.

CONCLUSION

For the foregoing reasons, it is ORDERED that defendants' motion for summary judgment is GRANTED, Plaintiff's motion for summary judgment is DENIED and all claims against defendants shall be DISMISSED.

IVAN R. LEMELLE
UNITED STATES DISTRICT JUDGE

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

In Suit of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be perserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
(c) Motion and Proceeding thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgmen sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examing the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue at trial. If the adverse party does not so resond, summary judgment, **if appropriate**, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are present in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Section 704 of Title VII, 42 U.S.C. section 2000(a) of the Civil Right Acts provides that:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings:
It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other

training or retraining, including on the job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, **because he has opposed any practice made by an unlawful employment practice by this subchapter**, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, **proceeding**, or hearing under this subchapter.

42 U.S.C. SECTION 1981(a)

"(c) Jury Trial.-- If a complaining party seeks compensatory or punitive damages under this section---

(1) any party may demand a trial by jury"

(2)

Supreme Court, U.S.
FILED
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No. 05-920

In The Supreme Court of the United States

NORRIS B. SMITH,

Petitioner,

vs.

CONSOLIDATED RECREATION AND COMMUNITY CENTER AND PLAYGROUND DISTRICT NUMBER 1 OF JEFFERSON PARISH, LOUISIANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, CONSOLIDATED RECREATION AND COMMUNITY CENTER AND PLAYGROUND DISTRICT NUMBER 1 OF THE PARISH OF JEFFERSON, TIM COULON, MICHAEL QUIGLEY, SCOTT MUHOBERAC AND KEVIN O'QUINN

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QUESTIONS PRESENTED

1. Whether the District Court was correct in dismissing plaintiff's claims against Jefferson Parish Government for failure to promote based on the Equal Protection Clause of the United States Constitution and the Equal Protection Clause of the Louisiana?

2. Whether the Court of Appeals was correct in affirming the District Court decision dismissing petitioner's Title VII claims after finding the petitioner was unable to carry his burden of proof and establish a pretextual reason for the denial of his promotion and his subsequent termination?

3. Whether the Court of Appeals was correct in affirming the decision of the District Court which granted summary judgment to Jefferson Parish and denied summary judgment to petitioner?

4. Whether the Court of Appeals was correct in affirming the District Court decision denying admission of the unsworn statements and other evidence petitioner presented to create material issues of fact precluding summary judgment?

5. Whether summary judgment violates a party's right to trial by jury?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

No party to this proceeding is a non-governmental corporation requiring a corporate disclosure statement.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner presents no compelling reasons to review this case on a writ of certiorari. Sup. Ct. Rule 10. Petitioner asserts a misapplication of a rule of law, which is a circumstance under which a petition for a writ of certiorari is rarely granted. Sup. Ct. Rule 10.

Petitioner erroneously claims a conflict with another court of appeal; does not present an important federal question that should be decided by this Court; and does not show any departure from the accepted and usual course of judicial proceedings in the lower courts. Sup. Ct. Rule 10(a)-(c). The lower courts' factual findings and application of established law were correct and properly supported by the record. Because petitioner has presented no compelling reason and no reason of the character warranting review of a matter, this Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

RELEVANT PROCEEDINGS BELOW

On July 3, 2001, Norris Smith, petitioner filed a discrimination and retaliation complaint in the U.S. District Court of the Eastern District of Louisiana seeking relief as authorized by 42 U.S.C. § 2000e, et seq., 42 U.S.C. § 1983, 42 U.S.C. § 1981, Family Medical Leave Act, Equal Pay Act, 42 U.S.C. § 1985 and 42 U.S.C. § 1986, intentional infliction of emotional distress, and the Louisiana Anti-discrimination statutes. On October 16, 2001, defendants filed a motion to dismiss for failure to state a claim or in the alternative a motion for summary judgment.

On November 29, 2001, Smith filed his memorandum in opposition to defendants' motion to dismiss/summary judgment. On September 30, 2001, the Lower Court granted in part and denied in part defendants' motion to dismiss. The Lower Court dismissed plaintiff's age discrimination claims under 42 U.S.C. § 1983, and § 1981, plaintiff's claims under the Family Medical Leave Act, Equal Pay Act claim, 42 U.S.C. § 1985 and 42 U.S.C. § 1986, and the intentional infliction of emotional distress claims against all defendants. The District Court held that Summary Judgment was appropriate on the Title VII claims against defendants Tim Coulon and Michael Quigley.

On September 2, 2003, defendants filed a motion for summary judgment. On September 8, 2003, plaintiff filed his motion for summary judgment. On September 17, 2003, defendants filed their memorandum in opposition to plaintiff's motion for summary judgment. On the same day, plaintiff filed his memorandum in opposition to defendants' motion for summary judgment.

On January 9, 2004, the Court entered a final judgment in favor of defendants and against plaintiff with reasons. On January 20, 2004, plaintiff filed a motion for new trial/reconsideration/rehearing based on new evidence. On February 6, 2004, plaintiff filed an appeal. On May 28, 2004, the district court denied plaintiff's Motion for New Trial/Reconsideration/Rehearing. On May 25, 2005, the Fifth Circuit affirmed the district court's decision.

RELEVANT FACTS

Norris Smith was employed with Jefferson Parish for approximately 17 years. In 1999, the position of Ground Maintenance Supervisor in the Consolidated Recreation and Community Center (hereinafter "Community Center") became available and an announcement made for all candidates to apply. Pursuant to Personnel Rule VII, Jefferson Parish Personnel Department certified candidates for the announced position to the Department of Parks and Recreation. Employees certified by the Jefferson Parish Personnel Department for the position of Grounds Maintenance Supervisor included Frankie Watts, Nathaniel Carr, Scott Muhoberac, Alfred Maggio, Norris Smith and John Doyle.

The Community Center interviewed all certified candidates for this position. During the interview process, all applicants were asked about their interest in an identical vacant position at Lafreniere Park. Mr. Smith refused to answer or consider any questions about a vacant position at Lafreniere Park. Following the interview of all certified candidates, Scott Muhoberac was selected for the position of Grounds Maintenance Supervisor.

Mr. Smith filed a Petition of Appeal to the Personnel Board on the basis of being "wrongfully denied a promotion" but did not allege any form of discrimination despite being specifically asked on the Petition for Appeal. The Jefferson Parish Personnel Board denied the appeal for a failure to state a cause of action. Petitioner contends that he met with the Jefferson Parish President, regarding Mr. Smith's allegations of discrimination but had no further contact with him regarding this issue.

Following petitioner's application for promotion and subsequent denial, petitioner engaged in a pattern of behavior whereby he failed to perform his stated job duties. He was cited numerous times and received various warnings by his supervisors for substandard work or failing to perform his duties. There were multiple occasions where the petitioner was observed not performing any work during his scheduled work hours. Additionally, petitioner's supervisors noted that the petitioner failed to properly plan for his pre-assigned duties.

Following a series of warnings and disciplinary actions, Mr. Smith filed a complaint with the EEOC alleging discrimination based on race and retaliation. Mr. Smith claimed he was denied a promotion because of his race and that he had been subjected to harassment because of his numerous complaints.

Despite previous warnings and disciplinary action, petitioner continued his course of action by failing to perform his required duties and refusing to participate in the disciplinary process. After several written warnings, a suspension and several disciplinary hearings, Mr. Smith was terminated from his position with Jefferson Parish. Mr. Smith was terminated for: a) neglecting to perform the duties of a Foreman in a satisfactory manner; b) insubordination; c) disrupting the operation of the department by videotaping parish employees during requested sick leave; and d) insubordination to the Director of the Department of Parks and Recreation during a Pre-Disciplinary Hearing on March, 20, 2001.

REASONS FOR DENYING THE PETITION

I. JEFFERSON PARISH GOVERNMENT TREATED ALL CERTIFIED CANDIDATES THE SAME AND DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION OR THE LOUISIANA CONSTITUTION DURING THE SELECTION PROCESS

It should be noted that Petitioner's first argument that the district court dismissed his equal protection claims on summary judgment was not raised in the lower courts. Specifically, it was not included in the Notice of Appeal filed with the United States Fifth Circuit Court. This Court has held that failure to raise an issue in the Court of Appeals results in the waiver of that issue. Furthermore, only in exceptional cases will this Court consider issues not previously raised. *Lawn v. US*, 355 U.S. 379, 362, 78 S.Ct. 311, 325 (1958), citing, *Duignan v. United States*, 274 U.S. 95, 200, 47 S.Ct. 566, 568 (1927); *Husty v. United States*, 282 U.S. 694, 701, 51 S.Ct. 240, 241 (1931). Clearly, petitioner has waived any equal protection claims because of his failure to previously raise the issue. Additionally this case does not present exceptional circumstance supporting this Court addressing the issues.

However, for the sake of argument, Jefferson Parish will address the petitioner's equal protection claims. While petitioner suggests this Court should review the decision below based on the dismissal of his claims on equal protection, this case does not present an issue of a violation of equal protection under the United States Constitution or the Louisiana Constitution. Petitioner asserts Jefferson Parish violated his equal protection rights by promoting a less qualified Caucasian candidate, but his allegations are incorrect.

Petitioner's statement of law regarding the standard for equal protection claims under both the United States Constitution and the Louisiana Constitution in his Petition for Writ of Certiorari were correct. In order to recover, petitioner must show he was treated differently than a similarly situated individual and that the reason for the different treatment was not rationally related to the employer's motive. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000). Mr. Smith has failed to present any evidence that he was qualified for the position of Grounds Maintenance Supervisor or that his equal protection rights under either the United States Constitution or Louisiana Constitution were violated by the denial of the promotion.

Jefferson Parish did not violate Mr. Smith's equal protection rights because they treated all candidates the same. Pursuant to Personnel Rule VII, Jefferson Parish certified six candidates as being qualified for the position of Grounds Maintenance Supervisor. Petitioner was included in the list of certified candidates. Mr. Smith, as well as all other certified candidates, interviewed for the position. During the interview, all applicants were asked about an identical position at Lafreniere Park which was also vacant. However, petitioner refused to answer any questions regarding the other position at Lafreniere Park.

During the interview, petitioner was informed the department was seeking a change in management generally, a new leadership direction and greater efficiency in light of increased overtime payments. Petitioner failed to identify solutions to address the overtime payments or increase efficiency in department activities. He only offered one new idea and did not respond with suggestions designed to change the management of the department.

Following the interview, Mr. Muhoberac was promoted to the Grounds Maintenance Supervisor position because he was the best qualified candidate.

Clearly, Mr. Smith was not qualified for the position as he did not fully participate in the interview process. He removed himself from consideration by his own actions of refusing to answer questions in the interview process. Therefore, Mr. Smith cannot establish a violation of his equal protection rights under either the United States Constitution or the Louisiana Constitution.

II. THERE IS NO SPLIT AMONG THE CIRCUITS RELATIVE TO PROVING PRETEXT IN A DISCRIMINATION CASE

Petitioner states there is a split among the circuits relative to proving pretext in a discrimination case. However, this assertion is simply untrue. This Court resolved the split amongst the circuits when *Reeves v. Sanderson Plumbing Products, Inc.,* was decided. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

In *Reeves*, this court explicitly stated certiorari was granted to resolve the conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, was adequate to sustain a finding of liability for intentional discrimination. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109.

In *Reeves*, this Court noted the allocation of the burden of proof under *McDonnell Douglas* and the order for the presentation of proof in discriminatory-treatment cases. While petitioner is correct that the Fifth Circuit previously required a plaintiff to produce evidence that the employer's reason was false and the real reason was discrimination and a split in the circuits arose, said reasoning was expressly rejected and the split was resolved by this Court in *Reeves*. *Reeves*, 530 U.S. at 141, 120 S.Ct. at 2106.

Reeves stands for the proposition that a plaintiff's prima facie case, when combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude the employer unlawfully discriminated through an inference. *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. *Reeves* acknowledges instances where a plaintiff may present evidence demonstrating an employer discriminated against him, but the employer would be entitled to judgment as a matter of law, if the record conclusively revealed some nondiscriminatory reason for the employer's decision. *Id*. Finally, this Court held that discrimination cases should not be treated differently than cases involving ultimate questions of fact. *Id.*

In his Petition for Writ of Certiorari at Page 16, petitioner asserts in Title VII cases, the Fifth Circuit Court of Appeals "requires a conflict in substantial evidence to create a jury question." However, this is a misstatement of the law because petitioner's reliance upon *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), as the latest jurisprudential statement by the Fifth Circuit is incorrect. The most current statement regarding Title

VII cases in the Fifth Circuit is *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000), which cites *Reeves*.

Here, the petitioner's actions during the interview process demonstrate the reasons he was denied the promotion. His subsequent pattern of behavior with repeated violations following the denial for the promotion demonstrate the reasons he was ultimately terminated. Given the petitioner's actions and the legitimate reasons put forth by the defendants regarding his failed promotion and termination, petitioner could not produce evidence sufficient to permit the trier of fact to conclude the defendants' motive was false, thereby creating an inference of pretext. As Judge Lemelle stated in his reasons for ruling, no fact finder could reasonably conclude from the evidence presented that the decision not to promote Smith was driven by discrimination animus. See Judgment of the District Court, Appendix C of the Petition for Writ of Certiorari filed by Norris Smith. There was no basis for the lower courts or any fact finder to infer the defendants unlawfully discriminated against the petitioner. Therefore, the decisions of the lower courts granting defendants' motion for summary judgment and denying petitioner's motion for summary judgment were correct.

Since the theme of the petitioner's argument in support of granting certiorari is the holding of *Reeves* and there is no split in the circuits, petitioner failed to present any reason for this Court to grant certiorari on the issue of inferring pretext in an employment discrimination case.

III. THE FIFTH CIRCUIT WAS CORRECT IN AFFIRMING THE DECISION OF THE DISTRICT COURT WHICH GRANTED JEFFERSON PARISH'S MOTION FOR SUMMARY JUDGMENT AND DENIED PETITIONER'S MOTION FOR SUMMARY JUDGMENT

In his Petition for Writ of Certiorari, petitioner alleges that cross motions for summary judgment are inherently contradictory for proving pretext in discrimination claims. This argument is incorrect and as previously discussed, there is no split in the circuits regarding the manner in which a party may establish an inference of pretext in an employment discrimination case.

Summary judgment is granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule of Civil Proc. 56(c); *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where the non-moving party will bear the burden of proof at trial on the dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an essential element to that party's case in order to survive summary judgment. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. Where the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt to the material facts. *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). The non-moving party must come forward with specific facts showing there is a genuine issue for trial.

Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356. The mere existence of a scintilla of evidence on the non-moving party's position is insufficient to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511, 477 U.S. 242, 252 (1986). "Absent countervailing evidence, the trier of fact must accept the defendant's explanation as the real reason." *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1295 (5th Cir. 1994), citing, *Brown v. American Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991). The non-moving party must present evidence upon which a reasonable jury could reasonably find for the plaintiff.

Petitioner alleges that cross motions for summary judgment are inherently contradictory because a court cannot find that issues of material fact exist as a basis for denying one motion while granting another party's motion on the same grounds. This statement is correct, but the argument is not applicable to the case before this Court. Here, Jefferson Parish's Motion for Summary Judgment was granted because the petitioner was unable to demonstrate facts which established pretext, thereby supporting his chance for recovery. Petitioner's Motion for Summary Judgment was denied because he was not entitled to judgment as a matter of law – meaning he could not produce countervailing evidence to refute Jefferson Parish's explanation for the denied promotion or subsequent termination.

There is no contradiction for a court to deny a motion for summary judgment to one party while granting summary judgment to another party. When a motion for summary judgment, like the petitioner's, is filed and is based on facts insufficient to demonstrate he is entitled to judgment as a matter of law, it should be denied because a

party is granted summary judgment only in instances where there are no issues of fact.

Petitioner further alleges summary judgment is improper in cases involving employment discrimination. This argument is also incorrect. Summary judgment is based on the elements of an underlying claim. In *Amburgey v. Cohart Refractories Corporation, Inc.*, the Fifth Circuit stated summary judgment should be considered in an employment discrimination case and denied, only, if the plaintiff can raise an issue of fact regarding pretext. *Amburgey v. Cohart Refractories Corporation, Inc.*, 936 F.2d 805, 813 (5th Cir. 1991). Pretext cannot be established by mere "conclusory statements" of a plaintiff who feels he has been discriminated against. *Id.*, citing, *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 976 (5th Cir. 1984).

In *Amburgey*, the court stated the following:

> [T]he salutary function of summary judgment in the employment discrimination arena [is that] summary judgment allows patently meritless cases to be nipped in the bud. . . . Where there is only an 'attenuated possibility that a jury would infer a discriminatory motive' . . . proceeding . . . serves no useful function. The problem, however, is that there is no bright line demarcating when a 'genuine issue of fact' degenerates into an 'attenuated possibility.' *Id.*, citing, *Thornbrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 645 (5th Cir. 1985).

Contrary to the petitioner's claims, the Fifth Circuit provides for the denial of a motion for summary judgment in an employment discrimination case if there exists the possibility of a jury drawing a contrary inference sufficient

to create a dispute as to a material fact. See *Amburgey, supra*; *Thornbrough, supra*; see also, *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369 (5th Cir. 1980).

Finally, petitioner alleges the statements he submitted and candidates' qualifications for the promotion demonstrated issues of material fact which precluded summary judgment. The statements were inadmissible because they contained procedural defects.[1] Because the petitioner presented inadmissible statements which were self-serving conclusory statements incapable of creating issues of material fact, the Fifth Circuit affirmed the district court's decision to grant Jefferson Parish's Motion for Summary Judgment and deny petitioner's motion.

Since there is no split in the circuits regarding an inference of pretext, no contradiction regarding cross motions for summary judgment and summary judgments is available in employment discrimination cases, Mr. Smith's writ for certiorari should be denied.

IV. THE FIFTH CIRCUIT WAS CORRECT IN AFFIRMING THE DECISION OF THE DISTRICT COURT WHICH DENIED ADMISSION OF THE UNSWORN STATEMENTS PRESENTED BY PETITIONER BECAUSE THEY WERE NOT RELIABLE EVIDENCE CAPABLE OF CREATING ISSUES OF MATERIAL FACT

Mr. Smith contends the lower courts erred in holding that written statements made by other employees regarding racial animus were inadmissible because they were not

[1] The admissibility of the statements presented by the petitioner is discussed more fully in the following section IV.

notarized. His assertion that the written statements he offered should have been admissible as "evidence of other wrongs" is clearly erroneous.

To defeat a motion for summary judgment, Federal Rule of Civil Procedure 56(c) requires the non-moving party to go beyond the pleadings, and by affidavit or depositions, answers to interrogatories and admissions on file, to designate specific facts showing that there is a genuine issue for trial. *Celotex, supra*, 477 U.S. at 322. Furthermore, an unsworn statement does not meet the requirements of Fed. Rule of Civ. Proc. 56(e). See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158, 90 S.Ct. 1598, 1609 (1970).

The statements of Larry Bordelon, John Jenkins and Sandon Bell were unsworn and signed without the penalty of perjury. The statements failed to comply with the requirements of 28 U.S.C. § 1746, which provides that unsworn declarations made under penalty of perjury would be admissible. These statements were inadmissible for any purpose in this case because their form was improper and not reliable. They did not qualify as affidavits under Fed. Rule Civ. Proc. 56(e) and were similar to the statements in *Adickes*. Thus, they were inadmissible for any purpose and incapable of creating issues of material fact.

Furthermore, the reason the petitioner sought to introduce the statements is irrelevant because they are procedurally defective and are unreliable. Even though the statements were inadmissible, the district court reviewed the statements and concluded they were insufficient to create issues of material fact. See Judgment of the District Court, Appendix C of the Petition for Writ of Certiorari

filed by Norris Smith. Based on the issues of reliability and procedural defects, the lower courts properly denied use of these statements for any purpose. Therefore, certiorari should not be granted.

V. SUMMARY JUDGMENT DOES NOT VIOLATE A PARTY'S CONSTITUTIONAL RIGHT TO A TRIAL BY JURY

Petitioner alleges summary judgment is a procedural device, which denies a party's right to his day in court and a trial by a jury of his peers. This argument is completely without merit and should be dismissed as such.

Petitioner cites numerous cases which identify axiomatic principles of law that form the basis for a right to a trial by jury. The cases petitioner cites do stand for those axiomatic principles, but not one of the cited cases stands for the principle that the use of summary judgment denies a party his right to a jury trial. Furthermore, under petitioner's theory of the right to a trial by jury, summary judgment is not the only procedural device contained in the federal rules which would deny a party his right to a jury trial. A motion to dismiss for failure to state a claim upon which relief could be granted also denies a party a right to a jury trial. A motion for a directed verdict at the end of a case removes the issue from a jury. Finally, under petitioner's theory, every party would be entitled to having a case go to trial for a jury to decide the merits.

Petitioner's argument is flawed because all of the abovementioned procedural devices are used to promote judicial economy and clear a court's docket of cases which a party is not entitled to recover. Stated a different way, summary judgment is an effective way of dismissing a case

where no reasonable party could find for the non-moving party. Clearly petitioner's argument regarding summary judgment violating a person's right to a jury is frivolous. Therefore, a writ for certiorari should not be granted to address it.

CONCLUSION

The lower courts' decisions were correct. There exists no split in the circuits regarding inferences of pretext or the use of summary judgments. Furthermore, petitioner's arguments regarding cross motions for summary judgment, admissibility of unsworn statements and summary judgment violating a right to a jury trial are all frivolous and lack any merit. Based on the foregoing, the Petition for Writ of Certiorari filed by Norris Smith should be denied.

Respectfully submitted,

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